Supreme Court, U.S.
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In The

Supreme Court of the United States

DOMINGO J. SEPULVEDA,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

On Petition For A Writ Of Certiorari To The Nebraska Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the trial court erred in ruling that Mr. Sepulveda's trial counsel was not ineffective in failing to object to the jury's finding of guilt as to both Manslaughter and Use of a Deadly Weapon to Commit a Felony, and in failing to object to the Jury Instruction for Use of a Deadly Weapon to Commit a Felony if Mr. Sepulveda was convicted of Manslaughter.

2. Whether the trial court erred in ruling that Mr. Sepulveda's appellate counsel was not ineffective in failing to allege in his direct appeal that Mr. Sepulveda could not have been convicted of both Manslaughter and Use of a Deadly Weapon to Commit a Felony, and in failing to assign on direct appeal the ineffectiveness of trial counsel.

3. Whether the Supreme Court erred in holding that the jury found the predicate offense was first degree assault and therefore Mr. Sepulveda could be legally convicted of use of a deadly weapon to commit a felony.

4. Whether the Nebraska statute governing Manslaughter Neb. Rev. Stat. § 28-305 is unconstitutionally vague.

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OPINION BELOW

The Nebraska Supreme Court's decision is reported at 278 Neb. 972 (2009). This opinion is reprinted in the Appendix at 1-15.

The trial court's opinion is reprinted in the Appendix 18-29.

JURISDICTION

The Nebraska Supreme Court filed their decision on November 20, 2009, and entered an order denying petitioner's motion for rehearing on December 23, 2009. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the Supreme Court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

U.S. Const. Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Neb. Rev. Stat. § 28-305

(1) A person commits Manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act.

Neb. Rev. Stat. § 28-308

(1) A person commits the offense of assault in the first degree if he or she intentionally or knowingly causes serious bodily injury to another person.

Neb. Rev. Stat. § 28-1205

(1)(a) Any person who uses a firearm, a knife, brass or iron knuckles, or any other deadly weapon to commit any felony which may be prosecuted in a court of this state commits the offense of use of a deadly weapon to commit a felony.

STATEMENT OF FACTS

On the evening of November 25, 1995, a party was held at a second-floor apartment near 39th and Farnam Streets in Omaha, Nebraska. (Appendix 21-24) The party was attended by a large number of people, many of whom were drinking beer and listening to a live band. (Appendix 21-24) Among those attending the party were, the Petitioner, Domingo J. Sepulveda (hereinafter, "Mr. Sepulveda") and the victim, James Geiger. (Appendix 21-24) During the evening an altercation broke out outside. (E2,9-10:5-6) Due to this fight there were several partygoers that eventually ended up outside. (E2,9-10:5-6) James Geiger was one of the partygoers who was actually outside during the fight. (E2,13:5,6) C.J. Nebbia, Jason Furmanski, and James Geiger all began running north on 39th Street. (Appendix 22) Witnesses testified that Mr. Sepulveda fired a weapon in the direction of the males running north on 39th Street. (Appendix 22) James Geiger died due to a single gun shot wound to the back of the right side of his head. (Appendix 24)

Mr. Sepulveda was charged by Information filed in the Douglas County District Court in Omaha, Nebraska with Count I, Murder in the Second Degree, and Count II, Use of a Deadly Weapon to Commit a Felony. (Appendix 19) A jury trial was commenced on May 20, 1996 in the Douglas County District Court before the Honorable John D. Hartigan, Jr. Mr. Sepulveda was represented at trial

by Gregory Schatz. (Appendix 19) During the Jury Instruction Conference of the trial, trial counsel failed to object to the Jury Instructions presented which allowed the jury to find Mr. Sepulveda guilty of both Manslaughter and Use of a Deadly Weapon to Commit a Felony. (E6,522:5-6) During the Jury Instruction Conference, the jury was never instructed by the trial court on the degrees of assault, particularly first degree assault. (E6,583:10-597:3)

Trial counsel also failed to object to the verdict forms which allowed the jury to find Mr. Sepulveda guilty of both Manslaughter and Use of a Deadly Weapon. (E6,522:5-6) The verdict forms were also blanket forms, which did not require the jury to determine under which portion of the Manslaughter statute, the jury found Mr. Sepulveda guilty of Manslaughter. (E6,522:5-6) The jury ultimately found Mr. Sepulveda guilty of Manslaughter and Use of a Deadly Weapon to Commit a Felony. (E6,599:5-6) After the guilty verdict, trial counsel did not object to the jury finding Mr. Sepulveda guilty of both Manslaughter and use of a deadly weapon to commit a felony, and the trial court allowed the jury verdict of guilty to both charges. (E6,599-600:5-6)

A direct appeal was filed and Judge Hartigan appointed Patrick Boylan to represent Mr. Sepulveda. (Transcript Volume I T1-2) (Transcript Volume I T12) In his direct appeal, Mr. Sepulveda claimed that the district court erred in: (1) Not affording his statutory right to a preliminary hearing before an independent hearing officer on the motion to revoke his probation

as well as a hearing on the motion to revoke after ruling at a preliminary hearing; (2) allowing the State to introduce evidence of the manner in which he was arrested; (3) imposing an excessive sentence; and (4) finding that there was sufficient evidence to support the verdict of guilty on the charges of Manslaughter and Use of a Weapon to Commit a Felony and in failing to grant Mr. Sepulveda's motion to dismiss and in accepting the jury's verdict. (Appendix 4-5) Appellate counsel neglected to assign as error the ineffectiveness of trial counsel. (Appendix 4-5) The Court of Appeals affirmed the Defendant's conviction and sentence. (Appendix 4-5) A Petition for Further Review was filed on May 30, 1997, and overruled on June 25, 1997. (Appendix 5)

On November 4, 2005 a Motion for Post Conviction Relief was filed by Mr. Sepulveda's attorney, Susan M. Bazis. (Transcript Volume II T4-14) In this Motion for Post Conviction Relief, Mr. Sepulveda alleged that both his trial and appellate counsel were constitutionally ineffective because Mr. Sepulveda should not have been convicted of both Manslaughter and Use of a Deadly Weapon to Commit a Felony. (Appendix 20) According to Mr. Sepulveda, he was not afforded effective assistance of counsel and therefore his Sixth Amendment Constitutional rights were violated. (Appendix 20)

On March 29, 2007 Judge Hartigan granted Mr. Sepulveda's Application to Proceed In Forma Pauperis and appointed Sarah Mooney to represent Mr. Sepulveda in this Post Conviction action.

(Transcript Volume II T34) An evidentiary hearing was held on July 7, 2008 in the Douglas County District Court before the Honorable John D. Hartigan, Jr. (Transcript Volume II T38) (4:1-19) During his evidentiary hearing Mr. Sepulveda argued that according to Nebraska law there is no requirement of an intent to kill in committing Manslaughter. *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994). According to Neb. Rev. Stat. § 28-1205, when the felony which serves the basis of the use of a weapon charge is an unintentional crime, the accused cannot be convicted of use of a weapon to commit a felony. *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989); *State v. Jones,* 245 Neb. 821, 515 N.W.2d 654 (1994). Due to the fact that Manslaughter is an unintentional crime and Use of a Deadly Weapon to Commit a Felony is an intentional crime, Mr. Sepulveda argued he could not legally be convicted of both Manslaughter and Use of a Deadly Weapon to Commit a Felony.

According to Neb. Rev. Stat. § 28-305(1) A person commits Manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act. According to *State v. Jones,* 245 Neb. 821, 515 N.W.2d 654 (1994), Manslaughter is always an unintentional killing, no matter the circumstances, whether it is during the commission of an unlawful act, or upon a sudden quarrel. Therefore, Mr. Sepulveda argued that his trial counsel was ineffective for not objecting to the jury instructions allowing the jury to convict him of

both Manslaughter and Use of a Deadly Weapon. (Appendix 25-29) Mr. Sepulveda also argued that his appellate counsel was also ineffective for failing to argue on appeal that his trial counsel was ineffective in not objecting to the jury instructions allowing the jury to convict him of both Manslaughter and Use of a Deadly Weapon. (Appendix 25-29)

On November 14, 2008 Judge Hartigan denied Mr. Sepulveda's Motion for Post Conviction Relief. (Appendix 29) In his opinion, Judge Hartigan argued that the jury found Mr. Sepulveda guilty of Manslaughter under the "sudden quarrel" portion of the Manslaughter statute. (Appendix 28) The trial court believed that Mr. Sepulveda was involved in the fight outside the apartment complex that night and thus resulted in his finding that Mr. Sepulveda was guilty of Manslaughter upon a "sudden quarrel." (Appendix 28) According to the trial court, this portion of the Manslaughter statute is an intentional act, therefore Mr. Sepulveda could be found guilty of both Manslaughter and the intentional crime of use of a deadly weapon to commit a felony. (Appendix 28)

The trial court made this ruling in direct contradiction to Nebraska law at that time, which clearly states that Manslaughter is always considered an unintentional crime. *State v. Jones,* 245 Neb. 821, 515 N.W.2d 654 (1994). The trial court made this ruling based upon the unconstitutionally vague language of the Manslaughter statute, Neb. Rev. Stat. § 28-305.

Due to the fact that unintentional is not set forth before "sudden quarrel"; the trial court interpreted this to mean that Manslaughter upon a sudden quarrel is an intentional act. (Appendix 28) This would allow Mr. Sepulveda to be found guilty of both Manslaughter and Use of a Deadly Weapon to Commit a Felony. The trial court therefore further held that due to the fact that Mr. Sepulveda could be found guilty of both Manslaughter and use of a deadly weapon, neither his trial or appellate counsel were ineffective. (Appendix 28)

On December 10, 2008 Mr. Sepulveda filed his Notice of Appeal. (Transcript Volume II TI) Mr. Sepulveda filed a Petition to Bypass the Nebraska Court of Appeals and to have his appeal heard directly before the Nebraska Supreme Court. Mr. Sepulveda's Petition to Bypass was granted on June 17, 2009 and his appeal was heard before the Nebraska Supreme Court. (Appendix 16) Mr. Sepulveda argued in his appeal to the Nebraska Supreme Court that the trial court erred in concluding that Mr. Sepulveda was guilty of Manslaughter upon a sudden quarrel; that the trial court erred in not finding that both his trial and appellate counsel were ineffective in failing to object to the jury instructions which allowed Mr. Sepulveda to be found guilty of the unintentional crime of Manslaughter and the intentional crime of Use of a Deadly Weapon to Commit a Felony.

On November 20, 2008, the Nebraska Supreme Court denied his appeal. (Appendix 14) In their opinion, the Nebraska Supreme Court did not find that Mr. Sepulveda was guilty of Manslaughter upon a sudden quarrel. Instead they found that Manslaughter was not the underlying felony for the weapons charge, and that first degree assault was the underlying felony. (Appendix 10-11) The Nebraska Supreme Court held that first degree assault is an intentional crime and therefore, Mr. Sepulveda could be found guilty of both Manslaughter and use of a deadly weapon to commit a felony. (Appendix 10-11) However, there is no evidence in the record of Mr. Sepulveda's trial that either counsel for the State or counsel for the Defense argued or explained to the jury that Mr. Sepulveda committed an intentional assault when he shot the gun. (E6,535:20-582:16) There also was never any discussion with the jury about the different levels of assault, including reckless assault. (E6,590:22-25) There is absolutely no discussion about any type of "assault" throughout any portion of the trial, except when it is read in as a very basic jury instruction. (E6,590:22-25)

Due to this rationale, the Supreme Court found that neither trial nor appellate counsel were ineffective because Mr. Sepulveda could have been found guilty of both Manslaughter and use of a deadly weapon to commit a crime. (Appendix 12-13) At no point in time did the Supreme Court ever even address the vagueness of the Manslaughter statute or the fact

that according to *State v. Jones,* 245 Neb. 821, 515 N.W.2d 654 (1994) it did not matter if the Manslaughter was committed upon a sudden quarrel it is still an unintentional act. Mr. Sepulveda filed a Motion for Rehearing. In his Motion for Rehearing he requested that the Nebraska Supreme Court address the issue of the vagueness of the Manslaughter statute which they neglected to do in his direct appeal. Mr. Sepulveda also requested that the Supreme Court reconsider their finding that Mr. Sepulveda was guilty of First Degree Assault, due to the fact that this issue had never been previously raised, and further, that based upon the record there was no sound legal basis for the Supreme Court to make such a finding. On December 23, 2008 the Nebraska Supreme Court denied his Motion for Rehearing. (Appendix 30) Accordingly, Mr. Sepulveda perfects his appeal to this Court.

REASONS FOR GRANTING THE PETITION

I. MR. SEPULVEDA WAS DENIED HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL. BOTH HIS TRIAL AND APPELLATE COUNSEL FAILED TO OBJECT TO THE FACT THAT MR. SEPULVEDA WAS ILLEGALLY CONVICTED OF THE UNINTENTIONAL CRIME OF MANSLAUGHTER AND THE INTENTIONAL CRIME OF USE OF A DEADLY WEAPON TO COMMIT A FELONY.

Both the trial court and Supreme Court ruled that Mr. Sepulveda was not denied effective assistance of either trial or appellate counsel. (Appendix 18-29, Appendix 1-15) The standard for determining whether a defendant's trial counsel was ineffective was set forth by the United States Supreme Court in *Strickland v. Washington*, 104 S.Ct. 2050 (1984). The standard requires that two components are met. First, the defendant must show that counsel's performance was deficient. This component requires a showing that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that counsel's deficient performance prejudiced the defense.

Whether counsel's performance was deficient is based upon an objective standard of reasonableness. *Marcrum v. Luebbers*, 509 F.3d 489 (8th Cir. 2007), citing *Strickland*. Specifically, a reviewing court must assess the reasonableness of all facts of the case,

evaluate the facts as they existed at the time of counsel's conduct, and evaluate counsel's performance functioned to assure adversarial testing of the government's case. *Id.* at 502. As part of its analysis, a reviewing court must determine whether counsel's performance was based upon a sound trial strategy or was the result of error. *Id.* With regard to the second prong, a defendant must show that "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id.* at 503. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Throughout Mr. Sepulveda's post conviction proceedings and appeal, he has alleged that both his trial counsel and appellate counsel were ineffective because they neglected to argue that legally he could not have been convicted of both Manslaughter and use of a deadly weapon to commit a felony. (Appendix 5, 20, 25) It has always been his position that according to Nebraska law, *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), Manslaughter is not an intentional crime, no matter what the circumstances. When the jury convicted Mr. Sepulveda of Manslaughter as opposed to second degree murder, the jury found that Mr. Sepulveda did not intentionally kill James Geiger. According to *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989), when the felony which serves the basis of the use of a weapon charge is an unintentional crime, the accused cannot be convicted of use of a weapon to commit a felony. It is

legally inconsistent to be convicted of the intentional crime of use of a deadly weapon to commit a felony, when the underlying felony is an unintentional felony. At no point during his appeal, or his jury trial did either trial or appellate counsel object to the fact that Mr. Sepulveda was found guilty of both Manslaughter and use of a deadly weapon to commit a felony. Therefore, Mr. Sepulveda is currently being wrongfully incarcerated for the use of a deadly weapon conviction, because this is an intentional crime, and the underlying felony for the use of a deadly weapon conviction is the unintentional crime of Manslaughter.

Trial counsel was ineffective because he did not object to the verdict forms and the jury instructions which allowed for Mr. Sepulveda to be convicted of both Manslaughter and use of a deadly weapon to commit a felony. (E6,522:5-6) Trial counsel should have objected to Jury Instruction #3 Section III. (Appendix 25-26) According to this Instruction, if the jurors found Mr. Sepulveda guilty of Manslaughter they could then also find him guilty of Use of a Deadly Weapon to Commit a Felony. This Instruction was clearly misleading and not an accurate statement of the current law as recited in *Jones* and *Ring*. The jury should not have been given the option to convict Mr. Sepulveda if the underlying felony for which he was convicted of was Manslaughter. This option should have only been given to the jurors if they found Mr. Sepulveda guilty of Second Degree Murder. An instruction or instructions which by the omission

of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995). Counsel's failure to object allowed not only a mis-statement of the law, but allowed the jury to be misled into an incongruous conviction. Trial counsel should have also objected to the blanket verdict forms, which allowed Mr. Sepulveda to be found guilty of both Manslaughter and Use of a Deadly Weapon to Commit a Felony. The fact that trial counsel failed to object to either the jury instructions or the guilty verdicts was highly prejudicial.

Furthermore, the above-referenced cases, *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989) and *State v. Jones*, 245 Neb. 821, 515 N.W.2d 908 (1989) were both decided prior to Mr. Sepulveda's trial. *State v. Jones* was decided in 1994, and *State v. Ring* was decided in 1989. Counsel is expected to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover those additional rules of law which, though not commonly known, may readibly be found by standard research techniques. *State v. McGurk*, 3 Neb.App. 778, 532 N.W.2d 354 (1995). Both *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), and *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989) could have easily been found by trial counsel through standard research. The fact that these court cases were available to trial counsel

should establish that counsel's performance was deficient based upon the objective reasonableness test according to *Marcrum v. Luebbers*, 509 F.3d 489 (8th Cir. 2007).

More importantly, during this time frame, there were several other Nebraska cases that cited to *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994) that could have also been easily found by trial counsel. In *State v. Blackson*, 245 Neb. 833, 515 N.W.2d 733 (1994), it provided that according to *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994) there is no requirement of an intention to kill in committing Manslaughter. In *State v. Morris*, 3 Neb.App. 835, 533 N.W.2d 110 (1995), the Court also cited to *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994) and stated that there is now no requirement of an intent to kill in committing the crime of Manslaughter in the State of Nebraska. All of these cases were applicable law during the time frame of Mr. Sepulveda's trial, and could have easily been found by trial counsel.

As is stated in *State v. McGurk*, 3 Neb.App. 778, 532 N.W.2d 354 (1995), trial counsel is required to find those additional rules of law which though may not be commonly known, but may be readily found by standard research techniques. Therefore, even if the premise of *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), that Manslaughter is an unintentional crime, was not commonly known among lawyers at the time, trial counsel could have easily found this premise by standard criminal research of cases in

Nebraska involving Manslaughter. Likewise, with the premise of *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989) that an accused cannot be found guilty of Use of a Deadly Weapon to Commit a Felony, if the underlying felony is an unintentional one, even if this premise was not commonly known among lawyers at the time, trial counsel could have easily found this premise by standard criminal research of cases in Nebraska involving Use of a Deadly Weapon to Commit a Felony during that time frame.

Furthermore, Neb. Rev. Stat. § 28-1205, the statute which defines using a deadly weapon to commit a felony has been in effect since 1977. Neb. Rev. Stat. § 28-305 the statute which defines Manslaughter, has been in effect since 1995. Therefore, both of these statutes were also good law at the time of Mr. Sepulveda's trial and appeal, and law that would have been readily available to both trial and appellate counsel. Also, around this time frame there were several Second Degree Murder cases that were reversed due to the fact that the jury instructions for Second Degree Murder had failed to include malice as an element of the crime. These cases also included the language explaining that Manslaughter is not an intentional crime. Trial counsel should have been able to find these same cases if counsel had done the standard research for defending a Second Degree Murder case. See *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994); *State v. Blackson*, 245 Neb. 833, 515 N.W.2d 773 (1994); *State v. Secret,* 246 Neb. 1002, 524 N.W.2d 551 (1994); and *State v. Ladig*, 246 Neb. 542, 519 N.W.2d 561 (1994).

Malice is what distinguishes Manslaughter from Second Degree Murder. Malice is defined as that condition of the mind which is manifested by intentionally doing a wrongful act without just cause or excuse. *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994); *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995). A person commits Manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act. Neb. Rev. Stat. § 28-305. As the Nebraska Supreme Court held in *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 it does not matter under what section of the Manslaughter statute a defendant is found guilty of Manslaughter, as neither is an intentional crime.

Furthermore, the trial court even stated on the record that the jury determined this murder was not an intentional one with malice. (E6,606:5.6) The trial court believed that based upon the fact that Mr. Sepulveda was convicted of Manslaughter he was convicted of an unintentional crime, as did both counsel for the State and for Mr. Sepulveda. In fact, throughout closing arguments on both sides, counsel argued to the jury that if they believed that Mr. Sepulveda intended to kill James Geiger, they could not find the Defendant guilty of Manslaughter, but instead of Second Degree Murder. (E6,553:5-6) (E6,580:5-6)

Trial counsel for Mr. Sepulveda stated the following: "if you decide that there's reasonable doubt that Mr. Sepulveda is the person that fired the gun, you're finished. You don't have to go any further.

That's the end of the – that's the end of your deliberations. If you find that he's not guilty, you have to acquit him. If, however, you find that he is, if you decide amongst yourselves that he is the person that pulled the trigger in this case, then you've got to go on and decide the other issues. And that is, No. 1, whether he intended to kill James Geiger. And if not, whether he's guilty of manslaughter or whether he was justified in doing what he did under the circumstances." (E6,570:5-6) Clearly, based upon trial counsel's arguments to the jury he was well aware that Manslaughter is an unintentional crime, and therefore he should have been able to figure out that since Manslaughter was an unintentional crime, Mr. Sepulveda could not be convicted of the intentional crime of Use of a Deadly Weapon to Commit a Felony. Likewise he should have objected to instructions which allowed for conviction of both Manslaughter and Use of a Deadly Weapon to Commit a Felony.

The State also argued in closing that based upon the evidence that Mr. Sepulveda pointed the gun at James Geiger's head as he chased him down the street and fired it at him and pointed it at the back of his head and pulled the trigger, that the only logical inference from those circumstances and actions of Mr. Sepulveda is that if you point a gun at somebody's head you intend to kill that person. (E6,552-553:5-6) (E6,553:5-6) The State further argued, "This isn't Manslaughter this is Second Degree Murder." (E6,553:5-6) The jury however did not agree with the State and found Mr. Sepulveda guilty of

Manslaughter, because they did not believe that the evidence proved that he had the intent to kill.

Had trial counsel made a motion to dismiss the guilty verdict for the Use of a Deadly Weapon, as well as objected to the Jury Instruction for Use of a Deadly Weapon if Mr. Sepulveda was convicted of Manslaughter, the outcome in this case would absolutely have been different. Mr. Sepulveda would not currently be serving a 30-50 year sentence for the crime of Use of a Deadly Weapon to Commit a Felony and therefore trial counsel's deficient performance prejudiced Mr. Sepulveda.

Appellate counsel was also prejudicially ineffective by failing to assign on direct appeal that trial counsel was ineffective for allowing the jury to wrongfully convict Mr. Sepulveda of use of a deadly weapon in conjunction with Manslaughter. Appellate counsel should have also alleged that trial counsel was ineffective in failing to object to the jury instructions and the verdict forms as they were presented to the jury, due to the fact that they allowed the jury to convict Mr. Sepulveda of the unintentional crime of Manslaughter and the intentional crime of use of a deadly weapon to commit a felony in direct contradiction to then existing law. *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994); *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989).

Appellate counsel, like trial counsel, is expected to possess knowledge of those plain and elementary principles of law which are commonly known by well

informed attorneys, and to discover those additional rules of law which, though not commonly known, may readibly be found by standard research techniques. *State v. McGurk*, 532 N.W.2d 354, 3 Neb.App. 778 (1995). As was argued with trial counsel, *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994) and *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989); were easily discoverable through standard research of the applicable Nebraska case law with regards to the crimes of Manslaughter and Use of a Deadly Weapon. An adequate review of the trial record and standard research would have resulted in the discovery of these cases.

Appellate counsel was prejudicially ineffective, like trial counsel, when he failed to allege that trial counsel was ineffective for failing to object to the verdict forms which allowed the jury to convict Mr. Sepulveda of the crimes of Manslaughter and Use of a Deadly Weapon to Commit a Felony. Appellate counsel was also prejudicially ineffective when he failed to allege ineffective assistance of trial counsel for failure to object to the Jury Instruction for Use of a Deadly Weapon to Commit a Felony if Mr. Sepulveda was convicted of Manslaughter. Appellate counsel also admitted during his deposition that he failed to object to the jury instructions and verdict forms as they pertained to Manslaughter and Use of Deadly Weapon to Commit a Felony. (E5,17:5-6) Had appellate counsel alleged that trial counsel was ineffective in Mr. Sepulveda's direct appeal for not making a motion to dismiss the guilty verdict for the

Use of a Deadly Weapon to Commit a Felony, as well as objecting to the Jury Instruction for Use of a Deadly Weapon to Commit a Felony if Mr. Sepulveda was convicted of Manslaughter, the outcome in this case would have been different. Mr. Sepulveda would not currently be serving a 30-50 year sentence for the Use of a Deadly Weapon crime and therefore his appellate counsel's deficient performance prejudiced Mr. Sepulveda.

The trial court held that Mr. Sepulveda committed Manslaughter upon a "sudden quarrel," which is an intentional act, therefore he could legally be found guilty of both Manslaughter and the intentional crime of Use of a Deadly Weapon to Commit a Felony. In its Order the trial court stated "Clearly, without spelling it out, the trial counsel's position was that this shooting occurred upon a sudden quarrel." "There isn't any evidence in the record, nor is there a suggestion by counsel (nor is there a definition of an unlawful act) that would support a determination that the shooting was unintentional." (Appendix 28) According to the trial court due to the fact that Mr. Sepulveda could be found guilty of both Manslaughter and use of a deadly weapon neither his trial or appellate counsel were ineffective in failing to address this argument during Mr. Sepulveda's appeal or trial. (Appendix 28)

The trial court's rationalization is clearly erroneous because according to *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), it does not matter under what basis you find the defendant guilty of

Manslaughter, it is always considered an unintentional crime. Therefore, even if the trial court believed that the Manslaughter occurred upon a sudden quarrel Mr. Sepulveda could not have legally been convicted of the intentional crime Use of a Deadly Weapon to Commit a Felony. Clearly, rendering both his trial and appellate counsel ineffective for failing to argue this during Mr. Sepulveda's trial and appeal.

The Supreme Court held that intentional assault rather than Manslaughter was the predicate felony for Mr. Sepulveda's use of a firearm to commit a felony conviction; whereby holding that his convictions for both Manslaughter and use of a firearm to commit a felony were not legally inconsistent because first degree assault as opposed to Manslaughter is an intentional crime. (Appendix 10-11) Based upon this analysis the Supreme Court held that, Mr. Sepulveda's trial and appellant counsels' failure to raise theses issues were not deficient performance and did not result in ineffective assistance of trial counsel. (Appendix 12)

The Supreme Court's rationalization is also clearly erroneous because there is no evidence on the record that the jury found Mr. Sepulveda guilty of first degree assault. The jury was never advised that Mr. Sepulveda could be found guilty of first degree assault, and that first degree assault was an intentional crime. The only intentional crime the jury was instructed on was that of Second Degree Murder, that is if they believed that Mr. Sepulveda intended

to kill James Geiger than he was guilty of Second Degree Murder. The Supreme Court ruled this way because it was the only way that they could hold that Mr. Sepulveda was legally convicted of both Manslaughter and use of a deadly weapon to commit a felony. First degree assault is an intentional act, and with an intentional act as the underlying felony, you can be convicted of use of a deadly weapon to commit a felony.

It is clear that both trial and appellate counsel were prejudicially ineffective in failing to address these issues during Mr. Sepulveda's trial and appeal and further, that the trial court and Supreme Court were erroneous in their rulings. By allowing the verdict forms and jury instructions to stand, Mr. Sepulveda was illegally convicted of Manslaughter and use of a deadly weapon. Had trial counsel moved to dismiss the guilty verdict for the use of a deadly weapon conviction, and objected to the Jury Instruction for use of a deadly weapon in the event Mr. Sepulveda was convicted of Manslaughter, the outcome in this case would absolutely have been different. Further, if appellate counsel had alleged that trial counsel was ineffective for allowing Mr. Sepulveda to be found guilty of both Manslaughter and use of a deadly weapon to commit a felony, Mr. Sepulveda would not currently be serving a 30-50 year sentence for the crime of use of a deadly weapon to commit a felony. Therefore both trial and appellate counsels' deficient performance prejudiced

Mr. Sepulveda pursuant to *Strickland v. Washington,* 104 S.Ct. 2050 (1984).

Further, it is also clear that Mr. Sepulveda's Sixth Amendment constitutional right to effective assistance of counsel has been violated because his trial and appellate counsels' performances were deficient, and but for these deficient performances he would not be serving a 30-50 year sentence.

II. THE SUPREME COURT VIOLATED MR. SEPULVEDA'S SIXTH AND FOURTEENTH AMENDMENT CONSTITUTIONAL RIGHTS BY FINDING THAT HE COMMITTED FIRST DEGREE ASSAULT BASED ON FACTS NOT PRESENTED TO THE JURY AND PROVEN BEYOND A REASONABLE DOUBT.

The Supreme Court held that Mr. Sepulveda committed first degree assault and not Manslaughter. (Appendix 10-11) In supporting its analysis, the Supreme Court misinterpreted the facts of the case to support the fallacious notion that the jury found Mr. Sepulveda committed first degree assault. (Appendix 3-4) The Supreme Court found that the evidence presented at trial was that Mr. Sepulveda chased down James Geiger, pointed the loaded gun at James Geiger and pulled the trigger as James Geiger ran away. (Appendix 3-4) The evidence presented at trial was never that Mr. Sepulveda specifically chased down James Geiger, but only that he pointed the gun in the area of where James Geiger was. (Appendix 21-24) In fact there were other individuals with James

Geiger, he was not alone when the shots were fired and James Geiger did not know that he had been shot. (Appendix 21-24)

Furthermore, the Supreme Court automatically leaps to first degree assault, disregarding any other levels of assault. (Appendix 3-4) This is because first degree assault allows the Supreme Court to convict Mr. Sepulveda of the use of a deadly weapon charge because first degree assault is an intentional act. (Appendix 9-11) Therefore, Mr. Sepulveda could be found guilty of use of a deadly weapon to commit a felony, because the predicate offense was an intentional act. (Appendix 9-11)

The Supreme Court states that the jury was instructed that "assault in any degree is an unlawful act within the meaning of the manslaughter statute." (Appendix 10) This was the Supreme Court's rationalization to find that Mr. Sepulveda committed an assault. However, there is no evidence in the record of Mr. Sepulveda's trial that either counsel for the State or counsel for the Defense argued or explained to the jury that Mr. Sepulveda committed an intentional assault when he shot the gun. (E6,535:20-582:16) The Supreme Court in its analysis however, fails to mention that at no point in time was the jury ever instructed on the elements of first degree assault. (Appendix 1-15) There also was never any discussion with the jury about the different levels of assault, including reckless assault. (E6,590:22-25) There is absolutely no discussion about any type of "assault" throughout any portion of the trial, except when it is

read in as a jury instruction, and this discussion is very brief. (E6,590:22-25) The trial court only states that "assault in any degree is an unlawful act within the meaning of the manslaughter statute." (E6,590:22-25) The jury was also never instructed on an intent requirement relating to the assault instruction, nor were they ever instructed on what specific elements needed to be proven beyond a reasonable doubt for Mr. Sepulveda to be found guilty of any level of assault. (E6,590:22-25)

The Sixth and Fourteenth Amendments grant a defendant a constitutional right to receive a fair trial. How can a defendant be granted a fair trial when he is convicted of a crime for which the jury was never instructed. There is nothing in the record of this case setting forth any basis for the Supreme Court to find that the underlying felony in this case was first degree assault. This Court has previously held in *Sullivan v. Louisiana*, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) that a jury must be properly instructed for a defendant to receive a fair trial. The omissions of certain elements in jury instructions is a violation of a defendant's Sixth Amendment right to a fair trial.

Even if for the sake of argument facts supporting a first degree assault may have been presented to the jury as the Supreme Court suggests, none of the required elements of first degree assault were found by the jury beyond a reasonable doubt, and they were never instructed on the elements of first degree assault. First degree assault is intentionally or knowingly causing serious bodily injury to another

person. Neb. Rev. Stat. § 28-308 (Reissue 2008). (Appendix 10) It is worth noting that although the Supreme Court cites to the 2008 first degree assault statute, the trial in this case was held in 1995. Therefore, it is error for the Supreme Court to rely on this later statute.

There was also a defense of others jury instruction given. (E6,590:2-21) During the jury instruction conference it was discussed that there was evidence presented during the trial that Mr. Sepulveda could have been acting in the defense of another, Chaz Vasquez. (E6,522:22-533:5) This instruction suggests that there was evidence that Mr. Sepulveda was involved in the fight and that he was acting out to protect one of his friends. This instruction could be used, and was used by the trial court, to argue that this Manslaughter was committed upon a sudden quarrel. (Appendix 24) Despite that fact, this Court found that there was no evidence that Mr. Sepulveda was involved in the fight and they disregarded this issue. (Appendix 11)

The Supreme Court also held that the jury found that James Geiger's death was unintentional because they found him guilty of Manslaughter and not Second Degree Murder and further, that since the jury found Mr. Sepulveda guilty of use of a deadly weapon during the commission of the crime they believed that this was an intentional act. (Appendix 9) However, there is nothing in the record during the trial of Mr. Sepulveda or in the jury instructions suggesting that the jury was ever instructed that

if they found Mr. Sepulveda to be guilty of an unintentional act, the jury could not find him guilty of use of a deadly weapon to commit a felony. (E6,522:5-6) The jury was only instructed that if they found Mr. Sepulveda guilty of Manslaughter, they could also find him guilty of use of a deadly weapon to commit a felony. (E6,522:5-6) Therefore, this assertion that the jury believed that Mr. Sepulveda was acting intentionally is simply inaccurate and erroneous.

The Supreme Court's findings are made with a clear misunderstanding of the law and facts of the case. They are simply trying to find a way to rationalize Mr. Sepulveda's convictions, because they do not want to find him not guilty of the use of a deadly weapon charge. Therefore, they are grasping at straws to come up with a legal basis to find that his convictions are consistent with the law. However, it is impossible to come back fourteen years after the trial of Mr. Sepulveda and try to presume what the jury decided. It is not fair to Mr. Sepulveda to make assumptions as to how a jury decided a case. The verdict form does not disclose under which portion of the Manslaughter statute the jury found Mr. Sepulveda guilty, it only states that the jury found him guilty of Manslaughter. The verdict form did not require the jurors to find Mr. Sepulveda guilty of Manslaughter upon a sudden quarrel, or unintentionally during the commission of an unlawful act, nor does it disclose the unlawful act which forms the basis for its verdict. The Jury Instructions also do not

set forth the elements that must be proven to have found Mr. Sepulveda guilty of assault at any level.

The only thing we know for sure about the jury's decision is that they believed that Mr. Sepulveda did not kill James Geiger intentionally, which is why they found him guilty of Manslaughter. The jury did not know that if the underlying felony was an unintentional crime, then Mr. Sepulveda could not be found guilty of use of a deadly weapon to commit a felony, because they were not so instructed by the Court. The Supreme Court is taking it upon itself to guess how the jury decided this case, and shaping non-existent facts to support an argument that will prevent Mr. Sepulveda in being successful in his appeal. However, to misinterpret the facts in this case is clearly prejudicial to Mr. Sepulveda and to presume facts not a part of the record violates the province of the jury and violates Mr. Sepulveda's constitutional rights.

Even if, for the sake of argument this Court does believe that the facts demonstrate an intentional assault scenario, and that Mr. Sepulveda did act with intent, it is too late for us to try and presume whether the jury found Mr. Sepulveda guilty under that same basis. This is where the Supreme Court is basing their decision on facts that were not submitted to the jury and they are finding Mr. Sepulveda guilty of a crime that he was not found guilty of by a reasonable doubt. Instead the presumption at this point has to go to Mr. Sepulveda, and that presumption is that the jury found Mr. Sepulveda guilty of an unintentional act.

III. THE SUPREME COURT ERRED BY NOT RESOLVING THE ISSUES IN MR. SEPULVEDA'S PETITION TO BYPASS CONCERNING THE VAGUENESS OF THE NEBRASKA MANSLAUGHTER STATUTE.

According to Neb. Rev. Stat. § 28-305 (Reissue 1995) "a person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act." The trial court interpreted this statute to mean that Manslaughter is only unintentional when it is committed "while in the commission of an unlawful act," because the statute does not use the term "unintentionally" in the clause discussing sudden quarrel. However, this is in direct contradiction with the Nebraska Supreme Court's holding in *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994). According to *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), the Nebraska Supreme Court held that there is no requirement of an intention to kill in committing Manslaughter. The distinction between second degree murder and Manslaughter upon a sudden quarrel is the presence or absence of an intention to kill. *Id.* at 830, 515 N.W.2d at 659.

Thus, once a jury finds that a killing is intentional, it cannot reach a Manslaughter verdict in lieu of a second degree murder verdict. *Id.* There simply is no distinction, whether the Manslaughter was based upon a sudden quarrel or the killing of another unintentionally while in the commission of an

unlawful act, it is an unintentional crime. Manslaughter is always an unintentional crime. According to Nebraska law Manslaughter is not an intentional killing under any circumstances, and the statute needs to reflect this in its language.

According to Neb. Rev. Stat. § 28-1205, when the felony which serves the basis of the use of a weapon charge is an unintentional crime, the accused cannot be convicted of use of a weapon to commit a felony. *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989); *State v. Jones,* 245 Neb. 821, 515 N.W.2d 654 (1994). Therefore, Mr. Sepulveda was wrongfully convicted of Use of a Deadly Weapon to Commit a Felony. The trial court found that Manslaughter upon a sudden quarrel is an intentional act based upon its wrongful interpretation of the statute.

The Supreme Court neglected to address the findings they made in *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994) in their opinion. (Appendix 1-15) In fact they neglected to even address the issue of the constitutionality of the Nebraska Manslaughter statute or the vagueness in the statutory language. Without clarity in the statutory language the trial courts are going to continue to rule that Manslaughter upon a sudden quarrel is an intentional act. Furthermore, if the trial courts continue to wrongfully interpret this statute, courts are going to continue to allow the accused to wrongfully be convicted of both Manslaughter and use of a deadly weapon to commit a felony. In *Jones v. U.S.*, 526 U.S. 227, 119 S.Ct. 1215 (1999), this Court held:

> Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. (quoting *U.S. ex rel. Attorney General v. Delaware & Hudson Co.,* 213 U.S. 366, 408, 29 S.Ct. 527, 53 L.Ed. 836 (1909).

If the language in the statute continues to be interpreted this way, this mistake of law will continue in future Manslaughter cases. According to Nebraska law Manslaughter is not an intentional killing under any circumstances, and the statute needs to reflect this in its language to prevent continuous appeals regarding convictions of Manslaughter in conjunction with Use of a Deadly Weapon to Commit a Felony.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Nebraska Supreme Court.

Respectfully Submitted,

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OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

STATE OF NEBRASKA, APPELLEE,
V.
DOMINGO J. SEPULVEDA, APPELLANT.

Case Caption

STATE V. SEPULVEDA

Filed November 20, 2009. No. S-08-1291.

Appeal from the District Court for Douglas County: John D. Hartigan, Jr., Judge. Affirmed.

Sarah M. Mooney, of Mooney Law Office, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion.

2. **Convictions: Weapons: Intent.** When the felony which serves as the basis of the use of a weapon charge is an unintentional crime, the accused cannot be convicted of use of a firearm to commit a felony.

3. **Assault: Intent.** The intent required by the assault statutes relates to the act which produces the injury, not to the consequences which result from the assault.

4. **Postconviction: Appeal and Error.** A party cannot raise an issue in a postconviction motion if he or she could have raised that same issue on direct appeal.

5. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.

6. **Postconviction: Appeal and Error.** Plain error cannot be asserted in a postconviction proceeding to raise claims of error by the trial court.

7. **Appeal and Error.** Consideration of plain error occurs at the discretion of an appellate court.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Domingo J. Sepulveda was convicted by a jury of manslaughter and use of a firearm to commit a felony. His convictions and sentences were affirmed on direct appeal. In this postconviction action, Sepulveda seeks reversal of his conviction for use of a firearm to commit a felony. We affirm the judgment of the trial court denying postconviction relief.

SCOPE OF REVIEW

When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion. *See State v. Dunster, ante*, p. 268, 769 N.W.2d 401 (2009).

FACTS

On November 25, 1995, Sepulveda attended a party in a second-floor apartment in Omaha, Nebraska, where a large number of people were drinking beer and listening to a live band. Chris Reich testified that during the party, Sepulveda showed him a gun in his coat pocket. Shortly thereafter, Reich got into an argument with a group of other men. A fight started and moved outside, and many of the partygoers followed. Three of the men involved in the fight including the victim, James Geiger, began to run down the street. Reich saw Sepulveda pull out his gun, point it at the men and begin shooting. Reich heard three or four shots, after which Geiger fell to the street.

Lorenzo Walker testified that after the gunfire began, people were "running all over the place," trying to avoid getting shot. Walker saw the gun in Sepulveda's right hand and heard four or five shots. Later that night, Walker picked up Sepulveda. Sepulveda bragged about the shooting and stated that he had made a $20 bet with someone that he would fire his gun that night.

Justin Doane testified that before the shooting, Sepulveda had Doane feel the gun in his coat pocket. After the fight, Doane saw Sepulveda pull the gun from his coat pocket and fire shots. Another witness testified that after the fight, Sepulveda ran down the street and fired his gun. She also saw Sepulveda standing with the gun in his hand after the shooting.

One of Sepulveda's shots hit Geiger in the back of the head and caused him to fall down. Geiger was eventually able to get up and continue walking down the street. A police officer found him on the porch of a nearby house, and he was taken to the hospital. Geiger died November 27, 1995, from a single gunshot wound to the back of his head.

Sepulveda was charged with murder in the second degree and use of a firearm to commit a felony. A jury found him guilty of the lesser-included offense of manslaughter and use of a firearm to commit a felony. The district court sentenced Sepulveda to 15 to 20 years' imprisonment on the manslaughter conviction and 30 to 50 years' imprisonment on the use of a firearm to commit a felony conviction. It ordered the sentences to run consecutively. Separately, Sepulveda was found guilty of violation of probation and sentenced to 59 to 60 months' imprisonment.

On direct appeal, Sepulveda claimed that the district court erred in (1) not allowing him various preliminary hearings, (2) allowing the State to introduce evidence of the manner in which he was arrested, (3) imposing excessive sentences, and (4) finding that

there was sufficient evidence to support a guilty verdict on both charges. In a memorandum opinion filed on April 30, 1997, in case No. A-96-909, the Nebraska Court of Appeals affirmed Sepulveda's convictions and sentences. This court denied his petition for further review.

Sepulveda's motion for postconviction relief alleges that his trial and appellate counsel were ineffective for failing to recognize that his convictions of manslaughter and use of a firearm to commit a felony were legally inconsistent. He asserts that he cannot be convicted of use of a firearm to commit a felony when the underlying felony is an unintentional crime. Sepulveda claims it is plain error to allow convictions for manslaughter and use of a firearm to commit a felony. He also claims that his trial counsel erred in failing to call several witnesses in his defense.

After an evidentiary hearing, the district court concluded that Sepulveda's trial and appellate counsel were not ineffective. The district court denied postconviction relief and dismissed the action. Sepulveda appeals.

ASSIGNMENTS OF ERROR

Sepulveda claims, summarized and restated, that the postconviction court (1) erred in concluding that manslaughter upon a sudden quarrel is an intentional crime; (2) erred in not finding that Sepulveda's trial counsel was ineffective because he did not object

to the jury instruction for use of a firearm to commit a felony when Sepulveda was convicted of manslaughter, was ineffective because he did not object to convictions for both manslaughter and use of a firearm to commit a felony, and was ineffective because he failed to call certain witnesses at trial; (3) erred in not finding that Sepulveda's appellate counsel was ineffective for failing to assign ineffectiveness of trial counsel regarding the firearm conviction in his direct appeal; (4) erred in not finding that Sepulveda was innocent; and (5) erred in refusing to find that it was plain error to allow convictions for both manslaughter and use of a firearm to commit a felony.

ANALYSIS

MANSLAUGHTER

Sepulveda was initially charged with second degree murder, but the jury found him guilty of manslaughter. Sepulveda claims that the trial court erred in finding that manslaughter upon a sudden quarrel is an intentional felony. We conclude that the trial court did not make such a finding. The court stated that a sudden quarrel involves an intentional act and determined Sepulveda had not met his burden of proof to show that the decision reached would have been different if the jurors had received different instructions. This was the extent of the court's finding on this issue.

When reviewing a question of law, an appellate court resolves the question independently of the lower

court's conclusion. *See State v. Dunster, ante* p. 268, 278 Neb. 268, 769 N.W.2d 401 (2009). Sepulveda argues that his manslaughter conviction cannot serve as the basis for a use of a firearm conviction. When the felony which serves as the basis of the use of a weapon charge is an unintentional crime, the accused cannot be convicted of use of a firearm to commit a felony. *See State v. Pruett,* 263 Neb. 99, 638 N.W.2d 809 (2002). Thus, if an unintentional act by Sepulveda was the predicate felony for the charge of use of a firearm to commit a felony, Sepulveda could not be convicted of that charge. Sepulveda's argument fails because his manslaughter conviction was not the predicate felony for his use of a firearm conviction.

PREDICATE FELONY FOR USE OF FIREARM TO COMMIT FELONY

Use of a deadly weapon to commit a felony occurs when a person

> uses a firearm, a knife, brass or iron knuckles, or any other deadly weapon to commit any felony which may be prosecuted in a court of this state or . . . unlawfully possesses a firearm, a knife, brass or iron knuckles, or any other deadly weapon during the commission of any felony which may be prosecuted in a court of this state. . . .

Neb. Rev. Stat. § 28-1205(1) (Reissue 2008). In accordance with the statute, the defendant must commit an underlying or predicate felony before he or she can

be convicted of use of a deadly weapon to commit a felony.

Sepulveda's reliance on *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989), and *State v. Pruett, supra*, is misplaced because *Ring* and *Pruett* are distinguishable from the facts of this case. In *State v. Ring, supra*, the defendant was convicted of felony motor vehicle homicide and using a motor vehicle as a deadly weapon to commit a felony. We interpreted the language "'to commit any felony'" to mean "'for the purpose of committing any felony.'" *Id.* at 724, 447 N.W.2d at 911. Accordingly, to prove a charge of use of a deadly weapon to commit a felony, the State was required to prove that the defendant used the motor vehicle for the purpose of committing a felony. The elements of motor vehicle homicide include that the defendant caused the death of the victim unintentionally while unlawfully operating a motor vehicle and that the unlawful operation of the motor vehicle was a result of either driving while under the influence of alcohol or driving recklessly. The State did not prove that the defendant intentionally used the motor vehicle as a deadly weapon. Because there was no intentional action, motor vehicle homicide could not be the predicate felony for a use of a deadly weapon to commit a felony conviction. *Id.*

In *State v. Pruett, supra*, the defendant was convicted of manslaughter and use of a deadly weapon to commit a felony while committing the offense of reckless assault. The defendant killed his friend by accidentally firing a live round instead of a "dummy

round" at the friend as a joke. On appeal, the defendant claimed that he could not be convicted of both manslaughter and use of a deadly weapon to commit a felony because both manslaughter and reckless assault were unintentional crimes. We agreed. When the felony which served as the basis of the use of a weapon charge is an unintentional crime, the accused cannot be convicted of use of a weapon to commit a felony. *Id.* Because the defendant did not commit any intentional acts, he could not be convicted of use of a deadly weapon to commit a felony. *Id.*

In the case at bar, the jury found that Sepulveda intentionally used a firearm in the commission of the crime of manslaughter. Manslaughter is defined as an unintentional crime; however, assault is not. The trial court instructed the jury that to convict Sepulveda of manslaughter, it must find four elements:

> 1. That the Defendant, Domingo J. Sepulveda killed James Geiger;
>
> 2. That he did so without malice, either:
>
> a. upon a sudden quarrel, or
>
> b. unintentionally while in the commission of an unlawful act;
>
> 3. That he did so on or about the 25th day of November, 1995 in Douglas County, Nebraska; and
>
> 4. That the Defendant did not act in the defense of another.

The jury was also instructed:

> Before you can find the Defendant guilty of unlawfully using a firearm in the commission of a felony as charged in Count II of the Information, the burden is upon the State of Nebraska to establish beyond a reasonable doubt each and all of the following:
>
> 1. That on or about November 25, 1995, in Douglas County, Nebraska, the Defendant did commit murder in the second degree or manslaughter as set forth in the above;
>
> 2. That in the commission of said crime a firearm was used by Defendant;
>
> 3. That such use of a firearm in the commission of the crime was intentional; and
>
> 4. That Defendant did not act in the defense of another.

If the crime of manslaughter were the underlying felony for the weapons charge, Sepulveda could not be convicted of use of a firearm to commit a felony. However, Sepulveda incorrectly assumes that the predicate felony for a conviction of use of a firearm to commit a felony must be the manslaughter conviction. The jury was instructed that "assault in any degree is an unlawful act within the meaning of the manslaughter statute."

First degree assault is intentionally or knowingly causing serious bodily injury to another person. Neb. Rev. Stat. § 28-308 (Reissue 2008). First degree

assault is a felony and a general intent crime. *State v. Cebuhar,* 252 Neb. 796, 567 N.W.2d 129 (1997). The intent required by the assault statutes relates to the act which produces the injury, not to the consequences which result from the assault. *See State v. Williams,* 243 Neb. 959, 503 N.W.2d 561 (1993).

Although Sepulveda may not have intended that Geiger would be killed as a result of Sepulveda's actions, there is no doubt that Sepulveda intended the assault of Geiger. Manslaughter can occur either upon a sudden quarrel or unintentionally while in the commission of an unlawful act. There was no evidence that Sepulveda suddenly quarreled with Geiger or even that Sepulveda had personal contact with Geiger.

There was evidence that Sepulveda bet someone $20 that he would fire his gun that night and showed the gun to several people before the shooting. Witnesses saw Sepulveda chase Geiger, point the loaded gun at him, and pull the trigger as Geiger ran away. This action resulted in the death of Geiger. The jury found that Geiger's death was unintentional. It also found that Sepulveda's use of the firearm in the commission of the crime was intentional. Under the circumstances, the act of firing the gun at Geiger which resulted in Geiger's death was an intentional and unlawful assault and was the predicate offense of use of a firearm to commit a felony. To hold otherwise would be to ignore the facts.

INEFFECTIVE ASSISTANCE OF COUNSEL

Sepulveda claims ineffective assistance of trial and appellate counsel based on the failure to raise the issue of manslaughter as an underlying felony of use of a firearm to commit a felony. The State argues that these claims are barred. A party cannot raise an issue in a postconviction motion if he or she could have raised that same issue on direct appeal. *State v. Jackson,* 275 Neb. 434, 747 N.W.2d 418 (2008). However, Sepulveda alleges ineffective assistance of appellate counsel in failing to claim ineffective assistance of trial counsel. Postconviction was Sepulveda's first opportunity to bring this claim; therefore, it is not procedurally barred. *See State v. Al-Zubaidy,* 263 Neb. 595, 641 N.W.2d 362 (2002).

To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Hudson,* 277 Neb. 182, 761 N.W.2d 536 (2009).

Intentional assault rather than manslaughter was the predicate felony to use of a firearm to commit a felony; therefore, convictions for both manslaughter and use of a firearm to commit a felony were not inconsistent. Sepulveda's trial counsel's failure to raise the issue was not deficient performance and did not result in ineffective assistance of counsel. Because Sepulveda's trial counsel did not render ineffective

assistance of counsel, Sepulveda's appellate counsel was not ineffective for failing to address the issue on appeal. These assignments of error are without merit.

Plain Error and Actual Innocence

Sepulveda alleges that the postconviction court should have found that it was plain error for the trial court to instruct the jury in a way that it could find Sepulveda guilty of use of a firearm to commit a felony if it found him guilty of manslaughter. He also argues that it was plain error to allow the jury's verdict of guilty on both charges to stand. He also asserts that the court erred in not finding plain error because he was legally innocent of the crime of use of a firearm to commit a felony, as the underlying crime of manslaughter is an unintentional crime.

Sepulveda essentially argues that the trial court erred in not recognizing the inconsistency between convictions for both use of a firearm to commit a felony and manslaughter, and not instructing the jury accordingly. Plain error cannot be asserted in a postconviction proceeding to raise claims of error by the trial court. Consideration of plain error occurs at the discretion of an appellate court. *State v. Archie,* 273 Neb. 612, 733 N.W.2d 513 (2007). Sepulveda's claims of plain error merely repackage his other assignments of error. Accordingly, plain error is not a claim that Sepulveda can raise in this postconviction motion.

INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO CALL WITNESSES

Finally, Sepulveda claims that he received ineffective assistance of counsel because his trial counsel did not call several individuals to testify on his behalf at trial. A party cannot raise an issue in a postconviction motion if he or she could have raised that same issue on direct appeal. *State v. Jackson,* 275 Neb. 434, 747 N.W.2d 418 (2008). Sepulveda had different counsel at trial and on direct appeal and could have raised the issue of his trial counsel's failure to call these witnesses at that time. To preserve this claim, Sepulveda needed to allege ineffective assistance of appellate counsel for failing to raise the claim on direct appeal. *See State v. Dunster, ante*, p. 268, 769 N.W.2d 401 (2009). He did not, and accordingly, this assignment of error is barred.

CONCLUSION

Sepulveda was properly convicted of use of a firearm to commit a felony because the underlying felony was an intentional assault. All of Sepulveda's assignments of error are without merit. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

THE STATE OF NEBRASKA, ss.

I hereby certify that I have compared the foregoing copy of an opinion filed by this Court with the original on file in my office and that the same is a correct copy of the original.

[SEAL] IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of this Court, in the City of Lincoln.

/s/ Lanet L. Asmussen
Clerk/Deputy Clerk

SUPREME COURT NO.	S-08-1291
TRIAL TRIBUNAL NO.	138-535
DATE OPINION FILED	November 20, 2009
DATE OPINION CERTIFIED	November 20, 2009

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
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June 17, 2009

Sarah Maser Mooney
MOONEY LAW OFFICE
12165 West Center Rd., Ste. 54
Omaha, NE 68144

IN CASE OF:
S-08-001291, State v. Domingo J. Sepulveda

The following internal procedural submission or filing by a party:

Pet Appellant Bypass Court of Appeals
submitted or filed 02/23/09

has been reviewed by the court and the following order entered:

Petition for bypass sustained. Parties ordered to supply the court with 7 additional copies of original briefs filed. Said additional copies are due within 14 days hereof.

Respectfully,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

IMPORTANT NOTICE

Due to the reduced number of cases awaiting submission to the Supreme Court and Court of Appeals, and as part of the courts' continuing efforts to reduce case-processing time, **future requests for brief date extensions will be closely scrutinized.** See Neb. Ct. R. App. P. §§ 2-106(F) and 2-109(A). Pursuant to Neb. Ct. R. App. P. § 2-110(A), if an appellant's default for failure to file briefs is issued, appellant "is required to file a brief within 10 days after receipt of such notice. Appellant's failure to file a brief in response to the notice of default subjects the appeal to dismissal."

PLEASE BE ADVISED THAT THESE RULES WILL BE STRICTLY ENFORCED.

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff, vs. DOMINGO J. SEPULVEDA, Defendant.	)	DOC. 138 NO. 535 **MEMORANDM ORDER**

A final hearing was on Defendant Domingo Sepulveda's Application for Post-Conviction Relief was held on July 7, 2008. The State of Nebraska appeared by Deputy County Katie Benson; Defendant Domingo Sepulveda participated by telephone conference, and was also represented by counsel Sarah M. Mooney. Evidence was adduced through the offer and receipt of documentary evidence consisting of: the deposition of Defendant Domingo Sepulveda; the deposition of Dana Peeler; the deposition of Mike Matthews; the deposition of attorney Gregory Schatz; the deposition of attorney Patrick Boylan; the Bill of Exceptions in this case; and judicial notice was also taken on the final instructions and verdict forms. The foregoing evidence is received. Following the remarks of counsel, briefs were submitted. Counsel also submitted memoranda regarding the decision in *State v. Davenport*, 17 Neb.App. 1 (2008). Following the Court's receipt of the foregoing materials, the matter was taken under advice. For the reasons expressed

below, the Court has concluded that the Defendant Domingo Sepulveda's Application must be denied.

Defendant Domingo Sepulveda was charged in this case with Murder in the Second Degree, and the Use of a Deadly Weapon to Commit a Felony. He was also charged with Violation of Probation, on an earlier probation sentence that was Imposed following his conviction for the Discharge of a Firearm at a Dwelling, House, Building, or Motor Vehicle.

Following a jury trial, the Defendant was convicted of a lesser included offense, Manslaughter, and the Use of a Weapon to Commit a Felony. Separately, he was also determined to be in violation of his probation on the earlier weapons offense. The Defendant was sentenced to a term of 15 to 20 years' imprisonment on the Manslaughter charge, and 30 to 50 years' imprisonment on the weapons charge. In the probation case, he was sentenced to 59 to 60 months' imprisonment. He was represented by attorney Gregory Schatz during his trial and sentencing.

Defendant filed a notice of appeal, and was represented on that appeal by attorney Patrick Boylan. His convictions and sentences were affirmed by the Nebraska Court of Appeals. This Post-conviction Application was filed on February 4, 2005. In requesting post-conviction relief, "a Defendant must establish the basis for such relief, and the findings of the District Court will not be disturbed unless they are clearly erroneous". *State v. El-Tabech*, 259 Neb. 509 (2000). A Defendant must allege facts

which, if proved, would constitute a violation or denial of his rights under the United States or Nebraska Constitutions. *State v. Schoonmaker*, 249 Neb. 230 (1996).

The Defendant claims in this proceeding that his constitutional rights were violated through the ineffective assistance of trial counsel, and through the ineffective assistance of his separate appellate counsel. The right to counsel being a constitutional right, ineffective assistance of counsel may constitute a claim for post-conviction relief. *State v. Grotzky*, 222 Neb. 39 (1986). In demonstrating counsel's ineffective assistance, a Defendant needs to show that counsel did not perform at least as well as a criminal lawyer with ordinary skill and training in the area of criminal law. *State v. Gonzalez-Faguaga*, 226 Neb. 72 (2003). The ineffectiveness of counsel must itself be so inept that it jeopardizes a Defendant's rights and shocks the Court with its inadequacy. *State v. Leading Horse*, 192 Neb. 485 (1974). There is a strong presumption that counsel acted reasonably, and due deference is to be given counsel in formulating trial strategy and tactics. To sustain a claim of ineffective assistance of counsel, a Defendant must show "that counsel's performance was deficient and (2) such deficient performance prejudiced the Defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668 (1994).

In this case, the Defendant says that his trial counsel was ineffective in two regards: falling to call attorney Michael Matthews, his counsel during the earlier weapons charge; Dana Peeler; Tiffany Besch; and James Parsons; and that trial counsel was ineffective in failing to object to jury instructions which included the lesser offense of manslaughter, together with the charge of use of a deadly weapon. Defendant contends that his appellate counsel was ineffective in failing to raise the trial lawyer's failure to object to jury instructions on the manslaughter and use charges. Because Sepulveda had separate counsel in his trial, and on his appeal, he has had an opportunity to raise the issues that are before the Court on this Application, and there is authority that this Application has been procedurally barred. *State v. Bennett*, 256 Neb. 747 (1999); *State v. Davenport*, 17 Neb.App. 1, 9 (2008).

The facts in this case are set forth in the Memorandum Opinion and Judgment on Appeal.

> On the evening of November 25, 2995, a party was held at a second floor apartment near 39th & Farnam Streets in Omaha. The party was attended by a large number of people, many of whom were drinking beer and listening to a live band. Among those attending the party were Sepulveda and the victim, 18-year old James Geiger.
>
> Charles Reich, 17, testified that he spoke with Sepulveda at that party and that Sepulveda showed Reich a gun he had in his

coat pocket. Reich stated that he thought the gun was a .22 but that Sepulveda said it was a .38. Reich described the events which preceded the shooting as follows: Reich was arguing with Chaz Vasquez inside the apartment when Jason Furmanski hit Vasquez in the face. Many of those present at the party ran outside, including Geiger, who then stood in the street. From his vantage point in a parking lot across the street, Reich saw Vasquez standing in the entryway of the apartment building and witnessed C.J. Nebbia run up to Vasquez and mace him. Nebbia, Furmanski, and Geiger all began running north on 39th Street, with Sepulveda in pursuit. Reich saw Sepulveda pull out his gun and point it "shoulder height in front of him, like going from side-to-side and pulling the trigger and shooting." Reich heard 3 or 4 shots. After the third shot, Geiger fell to the street and Reich ran in the opposite direction.

Lorenzo Walker testified that he spoke with Sepulveda at the party. Walker stated that he was outside when he saw a lot of people and then heard gunfire. He testified that people "were just running all over the place trying not to get hit by the bullets." Walker stated that he saw the gun in Sepulveda's right hand and heard 4 or 5 shots. Walker ran away and later, with a group of friends, picked up Sepulveda. According to Walker, Sepulveda stated that he had made a $20.00 bet with someone earlier that evening that he would fire his gun off that night. Walker

testified that Sepulveda engaged in a lot of bragging saying, "I did it."

Justin Doane testified that he saw Sepulveda at the party and that Sepulveda had Doane feel the gun in his coat pocket. Doane described the altercation between Vasquez and Furmanski and testified that he later saw Sepulveda pull out the gun from his coat and began chasing people. Doane stated that he heard 3 shots and that he saw Sepulveda fire the first shot. After that, Doane ran away. Doane stated that when the first shot was fired, he saw that Geiger and others were running in front of Sepulveda in the direction in which the gun was pointed.

Christen McNulty attended the party and testified that she witnessed Sepulveda run up the street after some people and fire a gun. She stated that she heard 2 or 3 shots after which she ran away. She returned to the area with friends a short time later and saw Sepulveda standing with the gun in his hand.

Omaha Police Officer Andrew Whiteing testified that he responded to a call about a shooting. After searching for the victim, Officer Whiteing found Geiger sitting on the porch of a house. Officer Whiteing stated that he asked Geiger if he had been shot and that Geiger was slow to respond and finally said, "I don't know." Officer Whiteing stated that he could see bruising on Geiger's forehead and face and that Geiger kept

> putting his hands up to his head and repeatedly said, "somebody help me." After Geiger was taken away by rescue squad, Officer Whiteing spoke to witnesses who told him that after Geiger fell, some people ran up to him, kicked and beat him, and ran off.
> . . .
>
> Geiger died on November 27, 1995. Pathologist Jerry Jones testified that Geiger suffered a single gun shot wound to the back of the right side of his head. [id. 1-4.]

Because of the timing in these events, and the connection between Vasquez and Sepulveda, the jury was instructed on the defense of others, and the lesser included offense to murder in the second degree, manslaughter.

Defendant claims that he was ineffectively represented by counsel, due to the failure to call as witnesses his prior attorney Michael Matthews, Dana Peeler, Tiffany Besch, and James Parsons.

"The decision to call or not to call a particular witness, made by counsel as a matter of trial strategy, even if that choice proves unproductive, will not, without more, sustain a finding of ineffectiveness of counsel. Trial counsel is afforded due deference to formulate trial strategy and tactics." *State v. Billups*, 10 Neb.App. 424 (2001). In his testimony, the Defendant concedes that counsel explained to him that Dana Peeler and Tiffany Besch would not be useful to him as witnesses. In light of the numerous eye witnesses to the Defendant's shooting, it is highly

unlikely that these witnesses' testimony would have been productive, and it is equally clear that the decision not to call them was a sound strategy in light of the compromise verdict that resulted.

Defendant's principle contention with regard to both trial counsel and appellate counsel, was that "Mr. Sepulveda could not be convicted of Use of a Deadly Weapon to Commit a Felony, if the predicate offense was an unintentional crime. *State v. Ring*, 233 Neb. 720, 447 NW2d 908 (1999); *State v. Jones*, 245 Neb. 821, 515 NW2d (1994); *Neb.Rev.Stat.* §28-1205. Guilty verdicts of manslaughter and use of a deadly weapon are legally inconsistent in that a Defendant cannot be convicted of use of a deadly weapon when convicted of the unintentional crime of manslaughter." Defendant's Brief, at 2.

This contention centers upon instruction No. 3, Section II, which states:

> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the Defendant of the crime of manslaughter are:
>
> 1. That the Defendant Domingo J. Sepulveda killed James Geiger;
> 2. That he did so without malice, either:
>
> a. upon a sudden quarrel, or
>
> b. unintentionally while in the commission of an unlawful act;

3. That he did so on or about the 25th day of November, 1995, in Douglas County, Nebraska; and

4. That the Defendant did not act in the defense of another.

The Defendant's position was comprehensively discussed in *State v. Pruett*, 263 Neb 89, 105 (2002):

"In *State v. Ring*, 233 Neb. 720 . . . applying principles of statutory construction, we held that the language "to commit a felony" in §28-1205 is synonymous with "for the purpose of committing any felony." We further explained that the purposes behind §28-1205 are to discourage individuals from employing deadly weapons in order to facilitate or effectuate the commission of felonies and to discourage individuals from carrying deadly weapons while they commit felonies. When we stated, "it cannot reasonably be said that §28-1205 will dissuade a person from using a deadly weapon to commit an unintentional felony; the two concepts are logically inconsistent." *Ring*, 233 Neb. at 724 . . . As a result, we concluded that when the felony which served as the basis of the use of a weapon charge was an unintentional crime, the accused could not be convicted of use of a weapon to commit a felony."

"Under *Neb.Rev.Stat.* §28-305(1) [Reissue 1995], "a person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of unlawful act," Pruett was convicted

of unintentionally causing the death of Waken while in the commission of a second degree assault under *Neb.Rev.Stat.* §28-309 [Cum.Supp. 2000]. . . . Pruett was specifically charged with reckless assault. He was not charged with intentionally assaulting Waken, and the jury was instructed only on reckless assault." id. at 105

This holding is explained in *State v. Iromuanya*, 272 Neb. 178, 213 (2006). "In both *Pruett* and *Ring*, we held that an unintentional crime could not serve as the predicate felony for a weapons charge under §28-1205. In this case, however, for a weapons charge intent is an essential element of both of the predicate felonies of which *Iromuanya* was convicted. Accordingly, we find no merit in the argument that his conviction on the two weapons counts amounted to impermissible multiple punishments," id. at 213.

In order to establish prejudice resulting from a deficiency in the performance of counsel, a defendant must show that but for counsel's deficient performance, the result of the trial would have been different. *State v. Thomas*, 263 Neb. (2002).

Here, trial counsel's assignment was a difficult one. While the facts supported a defense of others instruction, counsel could not and did not suggest that Defendant did the shooting. Rather, counsel focused on the adequacy of the State's identification, Also, without plumbing the murky depths of terms such as "malice", "Intent", "general intent", "unintentional", counsel for the Defendant suggested to the

jury that his client had been overcharged. This was an analysis which the jury accepted, returning a guilty verdict a short time thereafter on manslaughter and use.

Clearly, without spelling it out, the trial counsel's position was that this shooting occurred upon a sudden quarrel. There isn't any evidence in the record, nor is there a suggestion by counsel (nor is there a definition of an unlawful act) that would support a determination that the shooting was unintentional. The legal definition that is set forth in Instruction No. 3 set out the statutory formula, much the way DUI instructions contain both the alcohol and drug concentrations necessary to support a conviction, and just as "malice" is included in the statutory definition of 2nd degree murder, then though it is not an element of the crime. As such, the inclusion of this "unintentional" language was not misleading to the jurors, and their conclusion that the Defendant committed manslaughter was based upon counsel's theory that the death occurred during a sudden quarrel. A sudden quarrel involves an intentional act. Thus, the totality of the evidence before the court on this Post-conviction Application indicate that the Defendant has not met his burden of proof in showing that the decision reached would likely have been different absent the inclusion of the statutory language from the definition of manslaughter.

For the foregoing reasons, Defendant Domingo J. Sepulveda's Application for Post-Conviction Relief must be denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant Domingo J. Sepulveda's Application for Post-Conviction Relief is denied.

Dated this 14 day of November, 2008.

BY THE COURT:

/s/ John D. Hartigan, Jr.
John D. Hartigan, Jr.
District Judge

cc: Sarah Mooney
Katie Benson

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
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December 23, 2009

Sarah Maser Mooney
MOONEY LAW OFFICE
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IN CASE OF:
S-08-001291, State v. Domingo J. Sepulveda

The following internal procedural submission or filing by a party:

Appellant/Motion for Rehearing
submitted or filed 11/23/09

has been reviewed by the court and the following order entered:

Motion of appellant for rehearing overruled.

Respectfully,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

IMPORTANT NOTICE

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and as part of the courts' continuing efforts to reduce case-processing time, **future requests for brief date extensions will be closely scrutinized.** See Neb. Ct. R. App. P. §§ 2-106(F) and 2-109(A). Pursuant to Neb. Ct. R. App. P. § 2-110(A), if an appellant's default for failure to file briefs is issued, appellant "is required to file a brief within 10 days after receipt of such notice. Appellant's failure to file a brief in response to the notice of default subjects the appeal to dismissal."

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